MOTION FILED
MAR 17 1972

Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, et al.,
Respondents.

UNITED GAS PIPE LINE CO.
and
PENNZOIL UNITED, INC.,
Petitioners,

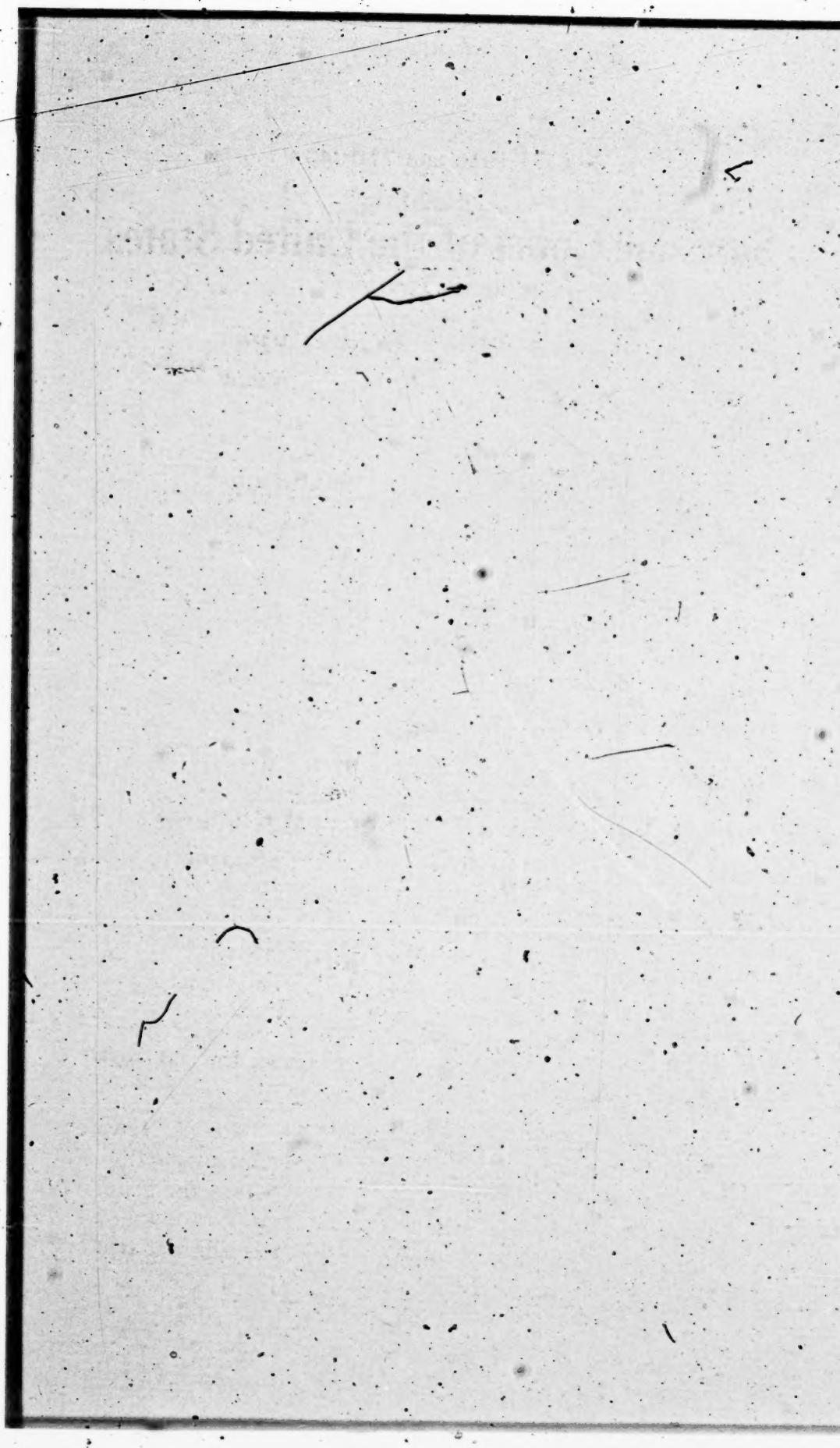
v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF FOR THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK, *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

The Public Service Commission for the State of New York (New York) moves this honorable Court for leave to file a brief *amicus curiae* in the above case.

The Public Service Commission for the State of New York is a regulatory agency of the state having jurisdiction *inter alia*, over sales of natural gas at retail within the state. Since virtually all natural gas sold within New York originates elsewhere and is sold to New York distributors by

pipelines whose rates and services are subject to the jurisdiction of the Federal Power Commission, the Public Service Commission has found it necessary to the protection of the interests of gas consumers in its state to intervene and participate actively in numerous proceedings before the Federal Power Commission directly or indirectly affecting natural gas service to New York.

In accordance with this practice the Public Service Commission has intervened and participated in a number of pending proceedings involving the curtailment plans of pipelines directly or indirectly serving New York, including the Federal Power Commission proceeding in Docket RP 71-29 involving the curtailment plans of the United Gas Pipe Line Company (United) which led to the court action under review in these proceedings. We have also intervened and are participating actively in another FPC proceeding, Docket CP 71-89, involving a United application to secure federal certification of certain sales it has been making in Louisiana, which is also the subject of the action under review.

The holdings by the court below that the Federal Power Commission lacked jurisdiction effectively to control the curtailment plans of United insofar as they relate to direct sales and lacked any jurisdiction over some of the sales for which United sought certificates, if permitted to stand would inevitably result in reducing the amount of gas United would have available to meet its other commitments, including its commitments to pipelines directly or indirectly providing service to the New York market. Since United is already curtailing a considerable percentage of the gas it is contractually obligated to sell such pipelines and this action has already required one of such pipelines to curtail deliveries to its New York customers, it is clear that affirmance of the decision below can only result in further serious damage to gas consumers in New York.

While the Public Service Commission for the State of New York is in general agreement with the position we understand the Solicitor General will take in this proceed-

ing on behalf of the Federal Power Commission, we believe that this Court's resolution of the important issues in this case will be aided by receipt of the views on the underlying jurisdictional questions by a state regulatory commission in one of the consuming states. The primary issues in this proceeding relate to the proper interpretation of those provisions of the Natural Gas Act, 15 U.S.C. 717(a), *et seq.*, which purport to assign discrete areas for federal and state regulation over the transportation and sale of natural gas in interstate commerce while still insuring that there will be a "comprehensive and effective regulatory scheme" affording adequate protection to the gas consumers the Act was enacted to protect. See *Panhandling Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 520; *Atlantic Refining Company v. Public Service Commission for the State of New York*, 360 U.S. 378, 388. The views on these questions of an interested state regulatory commission who actively participated in the proceedings before the Federal Power Commission will, we believe, be of value to this Court in its considerations. However, while consent to the filing of a brief *amicus curiae* has been secured from the petitioners, it has been refused by the respondent Louisiana Power & Light Company.

Accordingly, the Public Service Commission for the State of New York herewith moves that the Court accept for filing and consider its attached brief *amicus curiae* in the above proceeding.

Respectfully submitted,

PUBLIC SERVICE COMMISSION
for the STATE OF NEW YORK

PETER H. SCHIFF
General Counsel

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BRIEF FOR THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK, *AMICUS CURIAE*

The Public Service Commission for the State of New York herewith files its brief, *amicus curiae*, in the above entitled cases. For the reasons set forth below we believe the decision of the Court of Appeals here under review is not only erroneous but seriously misconceives the relationship between federal and state regulatory authority over the curtailment practices of interstate pipelines established by

the Natural Gas Act, 15 U.S.C. 717(a), *et seq.* We therefore urge the Court to reverse the decision of the Court below.

NEW YORK'S INTEREST

The Public Service Commission for the State of New York is a regulatory body established under the laws of that state to insure, *inter alia*, that New York citizens receive adequate supplies of natural gas at the lowest prices consistent with the healthy growth of the gas distribution industry. See *McKinney's Consolidated Laws of New York*, Vol. 47. Virtually all of the natural gas consumed in New York State originates in other states, in large part from Southern Louisiana and the Texas Gulf Coast, and from the continental shelf offshore the states of Louisiana and Texas in the Gulf of Mexico. From these and other areas it is then transported into New York by a number of interstate pipelines which are subject to the rate and service jurisdiction of the Federal Power Commission, some of whom in turn purchase major portions of their gas from other pipelines. As a result of this situation the Public Service Commission has found it necessary, in order to protect the interests of gas consumers in its state, to intervene and participate actively in proceedings before the Federal Power Commission relating to the pipelines serving New York and their suppliers. See, *e.g.*, *Atlantic Refining Co. v. Public Service Commission for the State of New York* (*CATCO* case), 360 U.S. 378 (1959).

Of the six interstate pipelines presently providing gas to New York distribution companies, five, Transcontinental Gas Pipeline Corporation, Texas Eastern Transmission Company, Algonquin Gas Transmission Company, Consolidated Gas Supply Corporation, and Columbia Gas Transmission Company, presently have curtailment proceedings pending before the Federal Power Commission and two of these, both of which account for major amounts of gas consumed in New York, have actually found it necessary to curtail

firm service to the customers in New York and other states for extended periods during the present winter heating season. In addition, curtailment proceedings are pending involving a number of other pipelines who sell large amounts of gas to the pipelines serving New York. Predominant among these other pipelines is the United Gas Pipe Line Company, the pipeline involved in the present cases, which is a major supplier of gas to Texas Eastern and Texas Gas Transmission Corporation, and through them to Consolidated Gas Supply, and Algonquin Gas Transmission.[1] It is New York's understanding that the firm service curtailment which Texas Eastern has had to impose during the present winter heating season is the direct outgrowth of the curtailment in turn imposed on it by United Gas Pipe Line. It was for this reason, among others, that New York intervened and participated in the United curtailment proceeding before the Commission, and has intervened in the several petitions for review of the Commission's Opinion No. 606 therein which have been filed in the Fifth Circuit.

ARGUMENT

1. The Public Service Commission for the State of New York is in general agreement with the position stated in the Solicitor General's brief for the Federal Power Commission in this proceeding. We are convinced that a proper reading of the Natural Gas Act affords the Commission more than adequate power under Sections 4, 5 and 16 of the Act to control the curtailment plans and practices of the interstate pipelines subject to its jurisdiction with respect to the transportation of natural gas for both direct and indirect sales.

Sections 4 and 5 of the Act, like Section 7, are in terms applicable to the "transportation or sale of natural gas sub-

[1] While most of the pipelines serving New York make some direct sales (though none within New York), this is a relatively unimportant aspect of their business. However, major pipeline suppliers of the pipelines serving New York, including preeminently United, make extensive direct sales.

ject to the jurisdiction of the Commission." Thus, if as the court below correctly holds, the Commission under Section 7(c) and (e) of the Act must grant a certificate before a pipeline may transport the gas in interstate commerce to make a direct sale (See *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 232 F.2d 467 (3rd Cir., 1956), *cert. denied*, 352 U.S. 891), the transportation so certified is likewise subject to the provisions of Section 4(b) of the Act precluding a natural gas company from affording any undue preference or advantage to any person or any undue prejudice or disadvantage to any other, or from "maintaining any unreasonable differences in. . . service, facilities, or in any other respect between localities or as between classes of service" (See *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, 789 (6th Cir., 1949)). And similarly the provisions of Sections 4, 5, and 16 authorizing the Commission to take action to correct violations of these basic standards are applicable with respect to all jurisdictional transportation of natural gas including that intended for direct sales, *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 647. Thus, even assuming *arguendo* that the court below was correct in its views as to the limits of the Commission's authority over direct sales under Section 7 of the Act, its summary conclusion (Pet. App. 21a) that these limitations are also applicable to the Commission's quite separate authority under Sections 4, 5 and 16 is a non-sequitur.

The Public Service Commission for the State of New York, like the regulatory authorities of many other states, has jurisdiction over direct sales made by interstate pipelines within its boundaries. This does not, of course, help it in any respect in the present situation, since United Gas Pipe Line Company, the pipeline involved, makes no sales, direct or for resale, in New York. And the fact that the states within which United operates have constitutional jurisdiction over its direct sales (See *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507) which they arguably could exercise in concert with

the Federal Power Commission to prevent discrimination between United's direct and resale customers in the course of any curtailment of service by the pipeline, does not mean that the Federal Power Commission lacks power under the Natural Gas Act to preclude such discrimination. For it is clear that it will not be to the interests of such states to limit the sales of gas to customers within their borders in order to avoid discrimination against customers in New York and other downstream locations.

Thus it is not surprising that this Court adverted to the curtailment question to support its conclusion in *Federal Power Commission v. Transcontinental Gas Corporation*, 365 U.S. 1, 27-28 that "when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than non-regulation." See also *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369-370. The fact is that the Federal Power Commission, since at least 1946, has asserted the authority it exercised here to deal with pipeline curtailment practices, including curtailments of direct sales, under Section 4, and 5 of the Act (See *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 5 F.P.C. 983 (1946)), and this Court since 1947 has recognized that curtailments of pipeline service to direct and resale customers alike is a matter "largely related . . . to *transportation* and thus within the jurisdiction of the Federal Commission to control in accommodation of any conflicting interests among various states," *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra*, 332 U.S. at 516-517.

2. The lower court's conclusions that United's sales in the so-called "Green system" did not involve interstate commerce and were therefore beyond the reach of the Federal Power Commission's certification jurisdiction, is a classic example of improper judicial interference with a

pending agency proceeding. As the court noted the very issue it purported to decide on the basis of the evidence presented to the district court, was then pending before the Commission. And the Commission, in its decision in the curtailment proceeding, had expressly recognized that its jurisdiction over United's plans to curtail service to the customers involved in the pending certificate proceeding would depend upon the outcome of that decision. Nevertheless, without awaiting the Commission's own holding as to the scope of its jurisdiction over the sales, or the terms under which such sales would be certificated if it possessed jurisdiction,[2] the lower court concluded that the interstate flow of gas into the "Green system" was "occasional and irregular, as well as minimal" (Pet. App. 25a), and accordingly that "the regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction."

We believe that the lower court's views on the jurisdictional issue in the Commission's certificate proceeding are erroneous and completely inconsistent with the governing decisions of this Court.[3] But we agree with the brief for the Federal Power Commission that there is no need for this Court to consider these questions at this time, and that it should instead set aside this part of the lower court's opinion on grounds that the jurisdictional questions upon which it purported to pass were committed in the first instance to the Federal Power Commission, subject only to appropriate review pursuant to the provisions of Section 19 of the Natural Gas Act. In this respect we note that

[2]New York had intervened in the certificate proceeding because, at a time when it was seriously curtailing service to its other customers, United was proposing no volumetric limits on its sales to the Green system customers and had contracted to *increase* the sales volumes to some of them.

[3]See, *e.g.*, *California v. Lo-Vaca Gas Gathering Co.*, *supra*; *Federal Power Commission v. Florida Power & Light Company*, No. 70-38, decided January 12, 1972, ___ U.S. ___ 30 L.Ed.2d 600; *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205.

while the Commission has now issued an opinion in the certificate case (*United Gas Pipe Line Co.*, Docket No. CP71-89, Opinion No. 610, issued February 9, 1972) holding, *inter alia*, that it does have jurisdiction to certificate United's sales to customers on the "Green system," rehearing has been sought of this opinion. In any event the Commission's Opinion does not determine whether and under what conditions the sales should be certificated; those questions were remanded for further hearing since the Commission believed the record was inadequate to determine whether the statutory criteria for certification had been met.

CONCLUSION

For the reasons set forth above the decision of the Court below should be reversed and remanded with instructions to direct the district court to dismiss the action.

Respectfully submitted,

Public Service Commission
for the State of New York

Peter H. Schiff
General Counsel